Filed 2/19/20 P. ex rel. Becerra v. Shine CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE ex rel. XAVIER BECERRA, as Attorney General, etc., Plaintiff and Appellant, v. WILLIAM SHINE, Individually and as Trustee, etc., Defendant and Appellant.	A154234 (Marin County Super. Ct. No. PRO 1305238)

After a lengthy bench trial on a petition for William Shine's removal as trustee of a trust, the trial court issued a statement of decision addressing approximately 20 examples of alleged breaches of fiduciary duty by Shine. The court found "Shine violated most, if not all of his fiduciary responsibilities and duties." For example, the court found that "Shine allowed improper tax returns to be filed, allowed a Subchapter S corporation status to be lost (by failing to follow prudent legal advice) and [Shine] used Trust funds to loan money to friends. His job performance was wholly unacceptable. Due to Shine's mismanagement, the Trust was damaged significantly."

Nevertheless, the court entered judgment in favor of Shine on many of the examples of his alleged breaches of fiduciary duty because the Attorney

General either failed to prove that Shine was grossly negligent, or it failed to prove specific damages to the trust. Based on the instances in which the Attorney General met its burden of proof, the court ordered Shine to reimburse the trust in the amount of $1,421,598.

Shine and the Attorney General both appeal.[1] Shine challenges only a part of the judgment against him; namely, the court's decision that Shine must reimburse the trust in the amount of $290,684 based on his failure to account for attorney fees supposedly paid to a law firm for the trust. Shine contends the amount of this award was based on expert testimony that was inadmissible. In its appeal, the Attorney General argues the court "erred in ruling that Shine's ten-year administration of Eva Lindskog's estate was reasonable," that the court applied the wrong standard of care, and that the court should have awarded $144,500 in additional damages resulting from Shine's mismanagement of real property belonging to the trust (the Oak Street Property or the Property).

We agree with Shine that the challenged expert testimony was inadmissible and that Shine was prejudiced by the court's admission of it. We modify the judgment to vacate the award of $290,684 against Shine. In all other respects, we affirm the judgment.

---

[1] In separate opinions to be filed in case Nos. A155833 and A155903, we address Shine's appeal from the court's order denying his request for indemnification, and his appeal from the order awarding fees and costs to the Attorney General. On May 31, 2018, the parties sought "consolidated handling of all related appeals." Although the three appeals derive from the same underlying case, they address different issues. Accordingly, we deny the request for consolidation.

FACTUAL AND PROCEDURAL BACKGROUND

We base our account of the factual and procedural background primarily on sections I and II of the statement of decision, which consist of information the parties do not challenge in their appeals.

Eva and Robert Lindskog (Eva and Robert) established a revocable trust in 1995, which was subsequently amended three times (the Trust). Eva and Robert were co-trustees of the Trust. In 2001, due to serious medical issues, Robert resigned as co-trustee, and Eva acted as the sole trustee until her death in January 2004.

Upon Eva's death, "the Trust assets were to be split and distributed into two sub Trusts; an irrevocable decedent's share [Eva's share] and a revocable survivor's share [Robert's share]." The Trust provided that upon Eva's death, "her one-half portion of the community estate was to be allocated (i) One Million Dollars . . . to her son Anthony and (ii) the remaining balance to the 'Livewire Lindskog Foundation', a California not-for-profit private foundation (which was to be established by the successor Trustee for the Lindskog Trust.)" When Eva passed away, Shine became the sole successor trustee of the Trust. "As Trustee, Shine was responsible for administering the Trust, distributing the assets and funding the charitable organization."

In 2005, Robert's conservator, Lois Watson, petitioned for removal of Shine as trustee for the revocable survivor's sub-trust (the *Watson* litigation). In 2008, the *Watson* litigation settled. In the *Watson* case, Shine was ordered to make the agreed upon distribution to Robert's heirs, and Shine was also ordered "to 'form the Foundation and allocate and distribute to it the remaining assets.' " As explained here, "upon the distribution of the assets and the formation of the charitable trust/foundation, the 1995 Lindskog Trust

was to dissolve." The statement of decision continued: "To date, the Foundation does not exist and the Trust has not been dissolved."

"In December 2013, the Attorney General's Office petitioned on behalf of the charitable beneficiaries of [the] unfunded charitable foundation for removal of . . . Shine . . . as Trustee of the . . . Trust . . . and for damages caused to the Trust . . . due to Shine's mismanagement." In February 2014, Shine agreed to his temporary removal as trustee. The case went to trial in October 2017. During the trial, Shine agreed to permanently step down as trustee and the court appointed David Bradlow as permanent trustee to administer the Trust.

The bench trial lasted 17 days. In February 2018, the court issued a 35-page statement of decision and judgment. The judgment addresses 19 "claims" or examples of Shine's alleged breaches of fiduciary duty. The court issued a judgment in favor of Shine on 12 of them and in favor of the People on the remaining 7 claims. Shine was ordered to pay damages in the aggregate amount of $1,421,598. Shine and the People both appeal.

DISCUSSION

Shine challenges only one aspect of the judgment; namely, the admissibility of the evidence supporting the court's order requiring Shine to reimburse the Trust in the amount of $290,684. We begin with this issue.

I. *Shine's Appeal*

Relying on our Supreme Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), Shine contends the only support for this award was the inadmissible hearsay testimony of an expert witness, Alan Yoshitake. Shine also contends the expert's testimony exceeded the scope of his deposition and the People failed to provide timely notice of its new scope. The testimony at issue concerns invoices sent by a law firm, O'Kane & McKee

LLP, to the Trust.[2] We agree with Shine that Yoshitake's testimony regarding the amount of these invoices was inadmissible, and no admissible evidence supports the amount that Shine was ordered to reimburse to the Trust.

A. *Governing Law and Standard of Review*

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay evidence is inadmissible, unless it falls under an exception. (*Id.*, § 1200, subd. (b).) In *Sanchez*, *supra*, 63 Cal.4th at page 686, applying the hearsay rule to expert testimony, our high court explained, "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at p. 685.) But "[w]hat an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

Generally, we review a trial court's "ruling excluding or admitting expert testimony for abuse of discretion." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) The judge's discretion is " 'a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.' " (*Ibid.*)

---

[2] Although the invoices were from a law firm, the parties often refer to them as "O'Kane's invoices" or the "O'Kane invoices." We adopt the same practice.

B. *The Expert's Testimony*

At trial, Yoshitake testified he reviewed a general ledger report, which indicated the Trust made "payments to Ms. O'Kane of $337,322 over a four-year period of time." There was also evidence of a payment of $75,000 to O'Kane's law firm prior to Shine's February 2014 removal as trustee. Yoshitake "reviewed all of the invoices that were produced in the litigation from Ms. O'Kane. I totaled those to be $200,925.11, and I could not find the difference." Yoshitake testified that this figure derived from the "actual invoices from Ms. O'Kane's law firm that I reviewed and totaled."

Defense counsel objected to this testimony, arguing "[t]here's no foundation for this. The bills aren't in evidence. These calculations weren't provided at his deposition. He testified [in his deposition] that he was shown things by the Attorney General. I believe he's taking information from documents that somebody else put together, and now he's testifying about it." Defense counsel argued the testimony was "totally improper, lacks foundation, violates Sanchez, [and] assumes facts." The court overruled the objection.

Yoshitake testified that, in his opinion, the Trust was damaged in the amount of $211,398. "And the way I got that was the [$]337,322 on [p]age 181 of the [general ledger] report, plus the $75,000 that was paid to Ms. O'Kane . . . right before Mr. Shine was removed, less the [$]200,925.11 of the actual invoices that were produced in this litigation that I reviewed. And so that difference is $211,398." Defense counsel objected that Yoshitake was offering "a completely different opinion tha[n] was provided at deposition regarding the supposed O'Kane damages." On cross-examination, Yoshitake acknowledged that his deposition testimony regarding attorney fees paid to the O'Kane law firm was based on a demonstrative exhibit prepared by the

Attorney General, but he "reviewed [the O'Kane] invoices after the deposition." In its statement of decision and judgment, the court ordered Shine to reimburse the Trust in the amount of "$211,407 . . . plus 10% interest in the amount of $79,277," for a total of $290,684.[3]

C. *Yoshitake's Expert Opinion Was Based on Inadmissible Hearsay*

Yoshitake opined that the Trust suffered damages based on the difference between what the Trust paid to O'Kane's law firm and invoices received from the law firm. But the amount of the O'Kane invoices is a case-specific fact contained in out-of-court statements and Yoshitake's testimony regarding this amount was offered for the truth of the matter asserted. (*Sanchez*, *supra*, 63 Cal.4th at pp. 684–686.) No other witness testified regarding this amount, nor did the People seek to admit into evidence the invoices themselves. Yoshitake's opinion was based on hearsay and inadmissible under *Sanchez*.

We reject the People's claim that Yoshitake's testimony was admissible because it "was based on his own personal knowledge, having reviewed the invoices himself, and Yoshitake was subject to cross-examination." Fundamentally, there was no foundation to establish the amount of the invoices. Invoices are hearsay. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage Etc. Co.* (1968) 69 Cal.2d 33, 42–43.) They "may be admitted for the limited purpose of corroborating" a witness's testimony regarding matters stated in the invoices. (*Id.* at p. 43.) But here, the People never sought to admit the invoices. Moreover, even though O'Kane testified during the bench trial, she was not asked to authenticate them, and no witness established the

[3] $211,407 is slightly more than Yoshitake's figure of $211,398. The parties do not discuss or explain the discrepancy.

amounts her law firm billed to the Trust.

Yoshitake testified as an expert in taxation, probate law, estates and trusts. He had no personal knowledge of the amount that O'Kane's firm billed the Trust, which is a case-specific fact. Therefore, the court should have sustained Shine's objection to his testimony regarding the amount of the invoices. (*Sanchez*, *supra*, 63 Cal.4th at p. 684 ["If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered . . . for their truth, thus rendering them hearsay."]; see also *Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 13 [finding testimony about attorney invoices inadmissible as hearsay].)

In arguing otherwise, the People rely on Evidence Code section 1509. As Shine points out, this statute was repealed many years ago. (Stats. 1998, ch. 100, § 1, p. 633.) The People also cite Evidence Code section 1523, subdivision (d). It provides: "Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole." (*Ibid.*) Subdivision (a) provides that generally "oral testimony is not admissible to prove the content of a writing." (*Id.*, § 1523, subd. (a).)

Here, it is not clear how many invoices Yoshitake reviewed in determining the law firm billed the Trust $200,925.11. Whether or not examining the O'Kane invoices in court would have resulted in a great loss of time—which the Attorney General fails to establish—Yoshitake's testimony regarding the amount of the invoices was inadmissible hearsay. Evidence Code section 1523, subdivision (d) does not articulate an exception to the hearsay rule.

Relying on *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 853, the Attorney General argues that "[o]nce the testimony of Yoshitake was admitted, the burden shifted to Shine to justify the payments to O'Kane & McKee." But the question presented is *whether* the testimony of Yoshitake was properly admitted. The party seeking damages has the burden of proving their amount. (*Copenbarger v. Morris Cerullo World Evangelism, Inc.*, *supra*, 29 Cal.App.5th at p. 15 [the plaintiff, not the defendant, "bore the burden of proving damages"].) The court abused its discretion by admitting Yoshitake's testimony regarding the amount of the O'Kane invoices.

D. *The Error Was Prejudicial*

The "improper admission of hearsay . . . constitute[s] statutory error under the Evidence Code." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) This error is prejudicial if it is "reasonably probable that a result more favorable to" the defendant would have been reached in its absence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

In its statement of decision, the court stated that "[w]hen reviewing the records of the Trust, A.L. Nella located invoices from Laura O'Kane totaling $200,925." A.L. Nella is an accounting firm that, in May 2014, generated or reconstructed the general ledger of the Trust's transactions. But page 181 of the A.L. Nella general ledger does not establish the amount of the O'Kane invoices, nor could it. As Shine points out, there is no indication in the record that a witness from A.L. Nella testified regarding the amount of the O'Kane invoices, nor is it clear how this witness would have personal knowledge of the amount. The Attorney General does not argue otherwise.

The Attorney General argues that even without Yoshitake's testimony, the court "could have considered a summary of legal invoices presented by the People through a lay witness," Steven Bauman. Bauman was employed

by the Attorney General's office as a supervising investigative auditor. When Bauman sought to testify regarding exhibits purporting to show damages to the Trust based on fees paid to various entities, including the O'Kane law firm, Shine objected that Bauman had not been designated as an expert. The court sustained the objection. Furthermore, the Attorney General fails to explain how Bauman—an employee of the Attorney General's office—had personal knowledge regarding the amounts billed by the O'Kane law firm. We conclude the Attorney General could not rely on either the testimony of an A.L. Nella employee or Bauman to establish the amount of the O'Kane invoices. Thus, Shine was prejudiced by the court's admission of Yoshitake's testimony regarding this amount.[4]

In its statement of decision and judgment, the court ordered Shine to reimburse the Trust in the amount of $290,684 based on the difference between the amount paid to and billed by the O'Kane law firm. Because there was no admissible evidence regarding the amount of the O'Kane invoices, it is reasonably probable the court would not have required Shine to reimburse the Trust in this amount if it had not admitted Yoshitake's testimony. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) We vacate that part of the judgment.[5]

II. *The Attorney General's Appeal*

In its appeal, the Attorney General makes two arguments. First, it

---

[4] In another part of its statement of decision, the court refused to award damages based on Yoshitake's testimony, noting that "[b]efore the court can rely on the expert opinion concerning damages, the Petitioner is required to submit the evidence to support the expert's opinion." Based on the record before us, a similar problem applies to Yoshitake's testimony regarding damages relating to payments to O'Kane's law firm.

[5] We do not address Shine's argument that the Attorney General failed to timely disclose the scope of this expert's trial testimony.

argues the court applied the wrong standard of care. Second, the Attorney General argues the court "erred by failing to award damages associated with" the Oak Street Property "even after making a finding that Shine was grossly negligent in failing to maintain that property." We address each argument in turn.

A. *The Court Did Not Apply the Wrong Standard of Care*

According to the Attorney General, the court's "application of the 1995 Trust's gross-negligence standard instead of the statutory standard of care for charitable trustees was a legal error this Court may review de novo." We disagree.

1. *Relevant Probate Code Provisions*

The Probate Code provides: "The trustee shall administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument." (Prob. Code, § 16040, subd. (a).) "The settlor may expand or restrict the standard provided in subdivision (a) by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions." (*Id.*, § 16040, subd. (b).) The Probate Code also provides that trustees of charitable trusts shall not "[e]ngage in any act of self-dealing," "[r]etain any excess business holdings," "[m]ake any investments in such manner as to subject the property of the trust to tax," or "[m]ake any taxable expenditure" as defined in a provision of the Internal Revenue Code. (Prob. Code, § 16102.)

2. *The Applicable Standard of Care*

Section 4.9 of the Trust provides that the trustee shall not be liable to

any beneficiary or heir " 'except for willful misconduct or gross negligence.' " In its first amendment, section 4.9 of the Trust reiterates that the trustee shall not be "liable for any mistake or error of judgment in the administration of the trust, except for such Trustee's gross negligence or willful misconduct." At trial, relying on these provisions, Shine argued he could only be held liable for conduct that amounted to willful misconduct or gross negligence.

Based on federal regulations regarding the taxation of estates and trusts, the Attorney General argued that after a "reasonable period of administration," the Trust terminated, and afterwards, Shine was subject to the higher standard of care that applies to trustees of private charitable trusts.

The regulations provide in part that "[t]he period of administration or settlement [of the estate of a deceased person] is the period actually required . . . to perform the ordinary duties of administration, such as the collection of assets and the payment of debts . . . . However, the period of administration of an estate cannot be unduly prolonged. If the administration of an estate is unreasonably prolonged, the estate is considered terminated for Federal income tax purposes after the expiration of a reasonable period for the performance by the executor of all the duties of administration." (26 C.F.R. § 1.641(b)-3(a) (2019).) Similarly, "the winding up of a trust cannot be unduly postponed and if the distribution of the trust corpus is unreasonably delayed, the trust is considered terminated for Federal income tax purposes after the expiration of a reasonable period for the trustee to complete the administration of the trust." (26 C.F.R. § 1.641(b)-3(b) (2019).)

At trial, the Attorney General argued that Shine's reasonable period of Trust administration ended at the latest in 2008, when the *Watson* litigation

settled.

In its statement of decision, the court disagreed with the Attorney General, finding "the reasonable period of Trust administration is ongoing." As explained by the court, "[p]rior to the conclusion of the *Watson* litigation, Shine was unable to divide the assets into the two sub-trusts. After the *Watson* litigation, Shine was able to divide the assets into the two sub-trusts but was unable to form or fund the charitable entity because he was advised that to do so would harm the Trust. Once that concern passed, Shine (with his lawyer) began the process of forming and funding the charitable foundation. Soon thereafter litigation began anew. With these facts in mind, the court does not believe that Shine could have concluded the Trust administration prior to his removal as Trustee."

Because the reasonable period of Trust administration did not end, the court determined Shine would "not be held personally liable for any losses to the Trust unless it was established that the losses were caused by his gross negligence or intentional misconduct."

3. *Substantial Evidence Supports the Court's Finding that the Reasonable Period of Trust Administration Was Ongoing*

The Attorney General contends it was legal error for the court to apply the standard of care found in the Trust documents rather than the higher standard of care that applies to trustees of charitable trusts.

We are not persuaded. Here, the applicable standard of care depended on whether it was reasonable for Shine to still be administering the Trust over ten years after Eva's death, and the resolution of this question depended upon the facts of the case. " '[W]hat constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case.' " (*Wagner Construction Co.*

v. Pacific Mechanical Corp. (2007) 41 Cal.4th 19, 30.) Accordingly, the relevant inquiry was and is predominantly factual, not legal. Indeed, when discussing the applicable standard of care in the trial court, the People acknowledged it was "a factual issue" to be determined based on the evidence.

On appeal, the Attorney General changes course, arguing the court committed "a legal error" when it found that the reasonable period of Trust administration was ongoing. Although the Attorney General attempts to couch its argument as a legal one, the Attorney General concludes that "[*i*]*n light of the facts of this case*, the trial court erred in determining that the reasonable period of administration was still ongoing." (Italics added.) The Attorney General requests that we "make *findings* as to the reasonable period of administration of the 1995 Trust, and remand this case for further *findings* as to additional damages resulting from Shine's negligent acts and omissions in violation of section 16102 of the Probate Code and applicable case law." (Italics added.)

The Attorney General misconstrues our role. As a court of appeal, we must affirm a lower court's factual findings if they are supported by substantial evidence. (*Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162 ["The trial court's factual findings . . . are subject to limited appellate review and will not be disturbed if supported by substantial evidence."].)[6]

---

[6] "Generally, '[t]he existence or nonexistence of substantial evidence is a question of law.' " (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1515.) Even so, by challenging the court's findings regarding the reasonable period of trust administration, the Attorney General must show the evidence was insufficient. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [defendant must " 'demonstrate that there is *no* substantial evidence to support the challenged findings' "].) In arguing otherwise, the Attorney General relies on *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, which stands for the unremarkable proposition that questions of statutory interpretation are questions of law

Here, in support of its determination that the reasonable period of Trust administration was ongoing, the court provided the following chronology of events:

"1. (2004) Eva . . . died. At that point, Shine as Trustee, was obligated to gather the assets (which were substantial), determine the value of the assets, file tax returns, pay off creditors, manage real property, and split and distribute the assets into two sub-trusts. Once the above was completed, Shine was required to form and fund a charitable foundation with encumbered real estate holdings (which was not an easy task).

"2. (2005) In 2005 the estate tax return was filed and Shine received an IRS closing letter.

"3. (2005-2008) The year after Eva['s] . . . death (and before the two sub-trusts were formed) the *Watson* litigation commenced. This litigation did not resolve until April of 2008. It was at that time that the assets were distributed into their respective sub-trusts and Shine was to start the formation of the charitable foundation.

"4. (2009-2011) The year after the *Watson* litigation concluded, Shine hired Attorney Laura O'Kane to assist him in the formation of the charitable organization. Attorney O'Kane advised Shine *not* to form or fund the charitable foundation until 2011, to avoid a perceived federal tax liability. Shine followed her advice.

"5. (2012) Once the tax liability concern passed, Shine and O'Kane started to form the charitable corporation. Attorney O'Kane . . . testified that she started the process of preparing to file for tax exempt status of the charitable corporation. A board of directors was established and

---

that must be reviewed de novo. (*Id.* at p. 432.) But here, the Attorney General does not challenge the court's interpretation of a statute.

distributions were made to qualifying organizations.

"6. (2013) Shine and attorney O'Kane became aware of the Attorney General's investigation. At that point, the efforts to fund the charitable organization stopped and the new litigation began, lasting another 4 years."

Based on these facts, the court found that Shine could not have concluded the Trust administration "prior to his removal as Trustee. [¶] Accordingly, after reviewing all of the issues confronted by Shine (as well as advice given to him by experienced professionals) the court has determined that the reasonable period of Trust administration is ongoing. Shine will not be held personally liable for any losses to the Trust unless it was established that the losses were caused by his gross negligence or intentional misconduct."

On appeal, when challenging the court's decision, the Attorney General cites various provisions of the Internal Revenue Code and the Probate Code, but the Attorney General relies primarily on *other facts* in the record. The Attorney General argues the Trust terminated around 2008 because "at the time of the settlement of the Watson lawsuit against Shine, the court ordered Shine to form and found the Livewire Lindskog Foundation. At that time, Shine only controlled Eva's share of the 1995 Trust assets," [but] "Shine failed to transfer [the] assets . . . to the charitable foundation during his ten-year tenure as trustee. In April 2009, Shine was warned by his own attorney not to unreasonably delay the administration of the 1995 Trust." (Italics omitted.)

When reviewing the court's finding that the reasonable period of Trust administration was ongoing, we cannot limit our appraisal—as the Attorney General does—to " 'isolated bits of evidence.' " (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.) Moreover, "it is of no consequence that the trial

court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Id.* at p. 874, italics omitted.) Based on the chronology of events provided by the court, substantial evidence supports its finding that the reasonable period of Trust administration was ongoing. Accordingly, we affirm the court's finding that the Trust had not terminated, and we uphold its decision to apply the standard of care found in the Trust documents.[7]

B. *No Abuse of Discretion in Decision Not to Award Damages Based on Shine's Mismanagement of the Oak Street Property*

In its appeal, the Attorney General argues the court "erred by failing to award damages associated with" the Oak Street Property. We disagree.

1. *Governing Law and Standard of Review*

A trustee who commits a breach of trust can be found liable for "[a]ny loss or depreciation in value of the trust estate resulting from the breach of trust, with interest." (Prob. Code, § 16440, subd. (a).) We "review the trial court's selection of the appropriate measure of liability for abuse of discretion." (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 911.) "The

---

[7] In its reply brief, the Attorney General relies upon a federal case from the Fifth Circuit Court of Appeals. It does not help the Attorney General. In *Brown v. U.S.* (5th Cir. 1989) 890 F.2d 1329, the court addressed taxpayers' challenge to an Internal Revenue Service finding that a reasonable time had passed for terminating various estates. (*Id.* at p. 1343.) " 'No litigation was pending regarding claims to the assets or claims by the estates.' " (*Ibid.*) According to the court, "the question of whether the administration of an estate has been unduly prolonged is one of fact. [Citation.] However, 'the facts in a given case may be so clear that reasonable men could not differ on the question of whether the administration was or was not unduly prolonged, in which case, the question is one of law.' " (*Id.* at pp. 1344–1345.) Here, based in part on pending litigation, the court found Shine's administration of the Trust was not unduly or unreasonably prolonged. Reasonable minds can differ on this question, and substantial evidence supports the court's finding.

appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479.)

2. *The Court's Decision Not to Award Damages*

In its statement of decision, the court found that, in December 2005, Shine loaned $203,500 of Trust money to the buyer of the Oak Street Property through a loan brokerage company, and when the buyer defaulted on the loan in October 2006, the lender foreclosed on the Property and the Trust became its owner. "The property was not maintained, taxes were not paid, and the property was not rented. In fact, it sat vacant for several years. In 2013, it was reported to Shine that the property was so overgrown, that the interior of the home was inaccessible." Shortly thereafter, the Oak Street Property was sold for $95,000. After taxes and fees were paid, "the Trust received $59,000 from the sale."

The court found that Shine's "lack of care and attention to this Trust property was grossly negligent," and that Shine was "responsible for any loss to the Trust estate resulting from his failure to maintain and preserve the property." However, the court did not award damages based on Shine's mismanagement because the Attorney General presented no evidence regarding "what the value of the property would have been at the time of sale if it had been properly maintained," or evidence regarding the amount of lost rental income (less maintenance costs).

3. *No Abuse of Discretion*

Relying on Probate Code section 16440, the Attorney General argues "the trustee is chargeable with any loss or depreciation in value of the trust

estate resulting from the breach of trust, with interest. Here, Shine allowed the property to sit vacant and unproductive for over six years. The determination of depreciation is simple: the property was purchased for $203,500 and the Trust only received $59,000 in net proceeds after its sale because of unpaid property taxes, and other fees."

We are not persuaded. The court did not find that Shine's decision to loan money in December 2005 was grossly negligent; instead it found Shine's failure to maintain the Oak Street Property was grossly negligent.[8] Without a citation to the record or case authority, the Attorney General argues the court "applied the wrong damage analysis," and the "original loan amount represented the fair market value of the property at the time of the loan." But the Attorney General points to no evidence in the record regarding what the value of the Property would have been in 2013 if it had been properly maintained, or what the rental income would have been if Shine had rented it. The Attorney General "bore the burden of proving damages." (*Copenbarger v. Morris Cerullo World Evangelism, Inc.*, *supra*, 29 Cal.App.5th at p. 15.) When it failed to do so, the court was justified in declining to award damages based on Shine's failure to maintain the Oak Street Property. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101 ["for

---

[8] At oral argument, the Attorney General argued its primary theory was that Shine should not have loaned Trust money and its secondary theory was that he failed to maintain the Property. But, in its closing brief at trial, the Attorney General discussed Shine's duty to preserve and protect the Property once it became part of the Trust. We are not aware of any discussion below regarding a primary and secondary theory of liability, nor do the Attorney General's appellate briefs mention it. We cannot say the court erred by focusing on the failure to prove damages resulting from Shine's failure to maintain the Property. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [appealed judgments are presumed correct and error must be affirmatively shown].)

breach of fiduciary duty, there must be shown the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. The absence of any one of these elements is fatal to the cause of action"].)

DISPOSITION

We remand for the trial court to modify the judgment to vacate the award of $290,684 against Shine relating to payments to the O'Kane law firm. In all other respects, we affirm the judgment. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

_____
Jones, P. J.

WE CONCUR:

_____
Simons, J.

_____
Needham, J.

A154234